

Montana Water Court  
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IN THE WATER COURT OF THE STATE OF MONTANA  
LOWER MISSOURI DIVISION  
WHITEWATER CREEK - BASIN (40K)  
PRELIMINARY DECREE

\*\*\*\*\*

CLAIMANT: USA (Dept. of Interior Bureau of Land  
Mgmt.)

**CASE 40K-0710-R-2022**

40K 73414-00

40K 73684-00

**NOTICE OF FILING OF MASTER'S REPORT**

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusions of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must serve a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

## MASTER'S REPORT

The above-captioned claims appeared in the Preliminary Decree for the Lower Missouri River Division, Whitewater Creek. The claims did not receive objections or notices of intent to appear, but did receive issue remarks during the DNRC's claims reexamination. FINDINGS OF FACT

1. Claim 40K 73414-00 received the following issue remark from the DNRC:

THE CLAIMED VOLUME APPEARS TO BE EXCESSIVE FOR THE CLAIMED PURPOSE. THE CLAIMED VOLUME EQUALS 2.61 TIMES THE CAPACITY OF THE RESERVOIR.

Claim 40K 73684-00 received the following issue remark from the DNRC:

THE CLAIMED VOLUME APPEARS TO BE EXCESSIVE FOR THE CLAIMED PURPOSE. THE CLAIMED VOLUME EQUALS 7.21 TIMES THE CAPACITY OF THE RESERVOIR.

2. On May 25, 2022, the Court set a filing deadline requiring the Claimants to work with the DNRC under §85-2-248(5), MCA to address the issue remarks on the claims.

3. On August 25, 2022, DNRC Water Resources Specialist Pam Weinmeister filed her *Memorandum* in this matter. Ms. Weinmeister's *Memo* states that she was contacted on July 1, 2022, by Melissa Norris on behalf of claimant United States Bureau of Land Management ("BLM"). In her *Memo*, Ms. Weinmeister states that Ms. Norris provided a Project Completion Report for reservoir PR-86, which is the reservoir associated with claim 40K 73414-00 and provided verbal information during the call regarding the reservoir record for reservoir PR-156 Ret Res, the reservoir associated with claim 40K 73684-00. Ms. Weinmeister further states that the BLM also submitted Verified Motions to Amend the water right claims aimed at bringing each of the reservoir records into historical conformity. The *Memo* includes proposed abstracts for each claim denoting the following proposed modifications:

#### 40K 73414-00

\*Reservoir: ONSTREAM

	<u>Govt Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
		SE	SW	NE	6	37N	31E PHILLIPS
Diversion to Reservoir:		DIVERSION # 1			<b>RESERVOIR NAME: PR-86 RESERVOIR</b>		
Dam Height:	<b>19.00</b>	<del>13.00</del>	FEET				
Depth:	<b>16.00</b>	<del>10.00</del>	FEET				
Surface Area:	<b>7.93</b>	<del>5.88</del>	ACRES				
Capacity:	<b>50.75</b>	<del>23.44</del>	ACRE-FEET				

#### 40K 73684-00

Volume: **34.43** ~~94.98~~ AC-FT

\*Source Name: INTERIOR DRAINAGE

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NE	NE	SW	7	37N	32E PHILLIPS

\*Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: DAM

\*Reservoir: ONSTREAM

	<u>Govt Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
		NE	NE	SW	7	37N	32E PHILLIPS
Diversion to Reservoir:		DIVERSION # 1			<b>RESERVOIR NAME: PR-156 RET RES</b>		
Dam Height:		13.00 FEET					
Depth:		10.00 FEET					
Surface Area:	<b>4.70</b>	<del>3.29</del>	ACRES				
Capacity:	<b>18.80</b>	<del>13.16</del>	ACRE-FEET				

4. Further, the *Memo* states that if the Verified Motions to Amend are implemented, the issue remarks should be considered resolved and removed from the claims.

5. Each claim also received notice-type issue remarks from the DNRC during its reexamination of claims. The remarks state that is no objections are filed, the remarks should be removed. No objections were filed.

#### PRINCIPLES OF LAW

1. A properly filed Statement of Claim for an existing water right is prima facie proof of its content. Section 85-2-227, MCA; Rule 10, W.R.Adj.R.

2. Prima facie proof may be contradicted and overcome by a preponderance of the evidence. Rule 19, W.R.Adj.R.

3. A preponderance of the evidence is evidence that shows a fact is “more probable than not.” *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 438, 240 P.3d 628.

4. If prima facie status is overcome, the burden shifts back to the claimant to demonstrate historical use. *79 Ranch v. Pitsch*, 204 Mont. 426, 432-33, 666 P.2d 215, 218 (1983).

5. Section 85-2-248(2), MCA, requires that the Water Court resolve all issue remarks that are not resolved through the objection process. *See also* Rule 7, W.R.Adj.R.

6. The Water Court may use information submitted by the DNRC, the Statement of Claim, and any other data obtained by the Court to evaluate a water right. Sections 85-2-227, -231(2), MCA.

7. When resolving issue remarks, the Water Court must weigh the information resulting in the issue remark and the issue remark against the claimed water right. Section 85-2-247(2), MCA. The factual evidence on which an issue remark is based must meet the preponderance of evidence standard before the prima facie status of a claim is overcome. 43Q 200996-00 et al., Order Establishing Volume and Order Closing Case, at 18, June 8, 2015.

#### CONCLUSIONS OF LAW

1. The evidence in the record is sufficient to resolve the issue remarks placed on the above-captioned claims.

2. The additional information and subsequent recommendations provided in Ms. Weinmeister’s *Memo* resolves the issue remarks appearing on the claims. Each claim should be modified as discussed in Finding of Fact No. 3, and the issue remarks should be removed.

3. The notice-type issue remarks appearing on each claim served their notice purpose and should be removed from the claims.

## RECOMMENDATIONS

Based on the foregoing Findings of Fact and Conclusions of Law, this Master recommends that the Court adopt the changes as outlined above.

Post decree abstracts of the water right claims reflecting the recommended changes are attached to this Report.

**ELECTRONICALLY SIGNED AND DATED BELOW.**

### **Service Via Electronic**

USA (Dept. of Interior Bureau of Land Mgmt.)

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**POST DECREE  
ABSTRACT OF WATER RIGHT CLAIM  
WHITEWATER CREEK  
BASIN 40K**

**Water Right Number:** 40K 73414-00 STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** ACTIVE

**Owners:** USA (DEPT OF INTERIOR BUREAU OF LAND MGMT)  
5001 SOUTHGATE DR  
BILLINGS, MT 59101 4669

**Priority Date:** JULY 1, 1942

**Type of Historical Right:** USE

**Purpose (use):** WILDLIFE

**Flow Rate:** A SPECIFIC FLOW RATE HAS NOT BEEN DECREED FOR THIS USE FROM THIS  
ONSTREAM RESERVOIR.

**Volume:** 61.38 AC-FT

**Source Name:** UNNAMED TRIBUTARY OF PEA LAKE

**Source Type:** SURFACE WATER

**Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SESWNE	6	37N	31E	PHILLIPS

**Period of Diversion:** JANUARY 1 TO DECEMBER 31

**Diversion Means:** DAM

**Reservoir:** ONSTREAM **Reservoir Name:** PR-86 RESERVOIR

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	SESWNE	6	37N	31E	PHILLIPS

**Diversion to Reservoir:** DIVERSION # 1

**Dam Height:** 19.00 FEET

**Depth:** 16.00 FEET

**Surface Area:** 7.93 ACRES

**Capacity:** 50.75 ACRE-FEET

**Period of Use:** JANUARY 1 TO DECEMBER 31

**Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			SESWNE	6	37N	31E	PHILLIPS

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**Remarks:**

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

73414-00

73415-00

**POST DECREE  
ABSTRACT OF WATER RIGHT CLAIM  
WHITEWATER CREEK  
BASIN 40K**

**Water Right Number:** 40K 73684-00 STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** ACTIVE

**Owners:** USA (DEPT OF INTERIOR BUREAU OF LAND MGMT)  
5001 SOUTHGATE DR  
BILLINGS, MT 59101 4669

**Priority Date:** MARCH 11, 1937

**Type of Historical Right:** USE

**Purpose (use):** WILDLIFE

**Flow Rate:** A SPECIFIC FLOW RATE HAS NOT BEEN DECREED FOR THIS USE FROM THIS  
ONSTREAM RESERVOIR.

**Volume:** 34.43 AC-FT

**Source Name:** INTERIOR DRAINAGE

**Source Type:** SURFACE WATER

**Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NENWSW	7	37N	32E	PHILLIPS

**Period of Diversion:** JANUARY 1 TO DECEMBER 31

**Diversion Means:** DAM

**Reservoir:** ONSTREAM **Reservoir Name:** PR-156 RET RES

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	NENWSW	7	37N	32E	PHILLIPS

**Diversion to Reservoir:** DIVERSION # 1

**Dam Height:** 13.00 FEET

**Depth:** 10.00 FEET

**Surface Area:** 4.70 ACRES

**Capacity:** 18.80 ACRE-FEET

**Period of Use:** JANUARY 1 TO DECEMBER 31

**Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			N2NWSW	7	37N	32E	PHILLIPS

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**Remarks:**

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

73684-00

73685-00